

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8586

Petition of Coolidge Solar I, LLC for approval of a Rule 4.100)
power purchase agreement concerning the purchase of energy)
and capacity from a 20 MW photovoltaic generation plant in)
Ludlow, Vermont)

Docket No. 8587

Petition of Burton Hill Solar, LLC for approval of a Rule 4.100)
power purchase agreement concerning the purchase of energy)
and capacity from a 20 MW photovoltaic generation plant in)
Barton, Vermont)

Docket No. 8588

Petition of Highgate Solar I, LLC for approval of a Rule 4.100)
power purchase agreement concerning the purchase of energy)
and capacity from a 20 MW photovoltaic generation plant in)
Highgate Center, Vermont)

Docket No. 8589

Petition of Sheldon Solar, LLC for approval of a Rule 4.100)
power purchase agreement concerning the purchase of energy)
and capacity from a 20 MW photovoltaic generation plant in)
Sheldon, Vermont)

and

Docket No. 8591

Petition of Florence, LLC for approval of a Rule 4.100 power)
purchase agreement concerning the purchase of energy and)
capacity from a 20 MW photovoltaic generation plant in)
Brandon, Vermont)

Order entered: 11/18/2015

ORDER STAYING PROCEEDINGS

I. INTRODUCTION

This Order addresses multiple petitions filed by the developer ("Ranger Solar")¹ of five proposed qualifying facilities² (collectively, the "Projects") seeking approval from the Vermont Public Service Board (the "Board") of long-term, levelized rate contracts (the proposed "PPAs") under Board Rule 4.100. In today's Order, we rule on the Department of Public Service's (the "Department") motion to dismiss the petitions and Ranger Solar's request for a waiver of Board Rule 4.104(H).³ For the reasons discussed in this Order we do not dismiss the petitions. However, each of these proceedings is hereby stayed until the Board has received a complete petition pursuant to 30 V.S.A. § 248 for each Project.

II. PROCEDURAL HISTORY

On August 21, 2015, Coolidge Solar I, LLC, Burton Hill Solar, LLC, Highgate Solar I, LLC, and Sheldon Solar, LLC filed petitions with the Board seeking the approval of contracts containing long-term, levelized rates pursuant to Board Rule 4.100.

On September 15, 2015, Coolidge Solar I, LLC, Burton Hill Solar, LLC, Highgate Solar I, LLC, and Sheldon Solar, LLC filed amended petitions with the Board. The amended petitions further requested a waiver of the requirements of Board Rule 4.104(H). On the same date, Florence Solar, LLC filed its petition and waiver request with the Board.

On September 25, 2015, the Board gave notice to Vermont's electric distribution utilities, the Department, and VEPP, Inc.⁴ that the petitions had been filed and that these entities could

1. While each of the Projects is organized as a stand-alone entity, all five are being developed by a single company, Ranger Solar, LLC.

2. Qualifying facilities are certain small power producers, primarily renewable energy plants, that may sell their output to electric utilities pursuant to the Public Utilities Regulatory Policy Act ("PURPA"). 16 U.S.C § 2601 et seq.

3. Board Rule 4.104(H) states:

Notwithstanding any other provision herein, long-term rates and levelized rates shall be available only to qualifying facilities which have been found by the Board, after due hearing, to satisfy the substantive criteria of 30 V.S.A. § 248(b).

4. VEPP, Inc. is the purchasing agent under Board Rule 4.100.

request a hearing on the proposed contracts pursuant to Board Rule 4.104(A). The notice also solicited comments on Ranger Solar's waiver request.

On October 9, 2015, the Department filed a motion to dismiss the proceedings pursuant to Rules 2.208 and 4.104(H) or in the alternative, requested a hearing.

On October 9, 2015, Green Mountain Power Corporation ("GMP") filed a request for a hearing on the petitions.

On October 9, 2015, Vermont Electric Cooperative, Inc. ("VEC") filed a request for a hearing on the petitions.

On October 12, 2015, Ranger Solar filed an initial response to comments.

On October 21, 2015, Ranger Solar filed supplemental responses to comments and a request for conditional approval.

On October 23, 2015, the City of Burlington Electric Department filed a notice of appearance in the case.

On October 27, 2015, GMP filed additional comments.

No other filings were received.

III. LEGAL BACKGROUND

Under PURPA, a qualifying facility is generally entitled to sell its output to an electric utility at the utility's avoided cost.⁵ The term "avoided cost" means "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."⁶ Additionally, the qualifying facility has the option of choosing whether the avoided costs are determined "at the time of delivery" or at the "time the obligation is incurred."⁷

In Vermont, this federal mandate is implemented by Board Rule 4.100. One unique feature of Vermont's implementation of PURPA is that each Vermont utility's obligation to purchase electricity generated by qualifying facilities is fulfilled by an entity known as the

5. 18 C.F.R. § 292.303.

6. 18 C.F.R. § 292.101(b)(6); Board Rule 4.103(A)(1).

7. 18 C.F.R. § 292.304.

"Purchasing Agent," which purchases power on behalf of all Vermont utilities.⁸ The power is then allocated to each utility on a pro rata basis by the Purchasing Agent. Under Rule 4.100, the avoided costs of the Vermont composite system are determined administratively, with the Department filing proposed rate schedules that are reviewed and ultimately approved by the Board. The most recent proceeding to set rates under Rule 4.100 concluded with the Board approving rates in February of 2015.⁹

Rule 4.100 provides qualifying facilities with the option of choosing the duration of the contract and whether the rates due under the contract will be levelized or non-levelized.¹⁰ The Rule requires that "long-term rates and levelized rates shall be available only to qualifying facilities which have been found by the Board, after due hearing, to satisfy the substantive criteria of 30 V.S.A. §248(b)."¹¹ Rule 4.104(E) defines contracts with terms of 5 years and above as "long-term sales."

Pursuant to Board Rule 4.104(A), the Board may approve a contract only after providing the Vermont utilities notice of the proposed contract and an opportunity for a hearing. The Purchasing Agent is not empowered to enter into any contract with a qualifying facility without the prior approval of the Board.

Finally, Board Rule 2.208 states that:

Substantially defective or insufficient filings may be rejected by the Board, provided, that if it will not unreasonably delay any proceeding nor unreasonably adversely affect the rights of any party, the Board shall allow a reasonable opportunity to a party to cure any defect or insufficiency. A filing which is found to be defective or insufficient shall not be deemed to have been cured until the date on which the last document is filed which removes the defect or makes the filing complete. A filing is substantially insufficient if, inter alia, it fails to include all material information required by statute or rule.

8. Board Rule 4.104(A).

9. *Investigation into Establishing Rates for Power Sold to the Purchasing Agent Pursuant to Public Service Board Rule 4.100*, 16 U.S.C. § 824a-3 and 30 V.S.A. § 209(a)(8), Docket 8010, Order of 2/9/15.

10. "Levelized rates provide a constant revenue stream by converting a series of annual rates to an equivalent annuity, resulting in larger payments during the early years of a project's operation." *Petition of East Georgia Cogeneration Ltd. Partnership*, 158 Vt. 525, 529 (1992).

11. Board Rule 4.104(H).

IV. POSITIONS OF THE PARTIES

Ranger Solar

Ranger Solar seeks approval of 20-year, levelized rate contracts for the purchase of electricity and capacity from five solar projects that Ranger Solar plans to develop in Vermont. Ranger Solar requests that the Board grant a waiver of Board Rule 4.104(H) and "approve the form of contract that has been submitted . . . conditioned on the Board finding, after reviewing the testimony and evidence presented in [a subsequent] . . . proceeding, that the Projects satisfy the section 248(b) criteria."¹² Ranger Solar states that this course of action is consistent with the substantive requirements of Rule 4.104(H).

Ranger Solar contends that there is good cause to grant the requested waiver. Ranger Solar states that the up-front costs associated with filing Section 248 petitions for the Projects are potential barriers to development of the Projects. Therefore, Ranger Solar seeks approval of the contracts to access financing to pay for these activities, which Ranger Solar asserts are consistent with important state renewable energy policies.

In response to the Department's motion to dismiss and the comments of the utilities, Ranger Solar contends that the form of the PPAs is similar to that of contracts previously reviewed and approved by the Board for standard-offer projects.¹³ Ranger Solar notes that the avoided cost rates contained in the PPAs were recently approved in Board Docket 8010. Therefore, Ranger Solar posits, there is no need for a new, litigated proceeding to review the PPAs. Ranger Solar further argues that due to their participation in Docket 8010, the Department, GMP, and VEC are collaterally estopped from challenging the Docket 8010 rates in this proceeding.

Ranger Solar argues that the Board's adoption of rate schedules in Docket 8010 created a "legally enforceable obligation" pursuant to federal law. Ranger Solar contends that after those

12. Petition of Ranger Solar, dated September 15, 2015, at 5.

13. The standard-offer program is a statutory program that requires the Vermont utilities, through the standard-offer facilitator, to purchase a certain amount of electricity from in-state renewable energy plants.
30 V.S.A. § 8005a.

proceedings, the utilities were obligated, pursuant to Board Rule 4.104(F),¹⁴ to execute a contract with the Purchasing Agent for the purchase of electricity at those rates. Ranger Solar asserts that this requirement reflects a "contemporaneous contractual commitment" by the utilities. The delay attended by non-compliance with Rule 4.104(F) has prejudiced the qualifying facilities, Ranger Solar argues. To summarize on this point, Ranger Solar states that by committing itself to sell to the Vermont utilities at the Docket 8010 rates, it bound the utilities to a reciprocal commitment, citing previous decisions by the Federal Energy Regulatory Commission.

Ranger Solar asserts that the PPAs under consideration are similar in price and duration to bilateral contracts entered into by GMP. Ranger Solar disputes GMP's assertion that the PPAs do not contain important provisions to protect ratepayers and contends that the PPAs will not disadvantage Vermont customers. Ranger Solar further asserts that GMP and VEC have offered an overly narrow reading of Vermont's renewable energy goals and that the Projects are consistent with state renewable energy policy.

The Department

The Department requests that the Board dismiss the petitions pursuant to Board Rule 2.208 because the petitions do not address the Section 248 criteria. The Department asserts that the Board is required to find that qualifying facilities meet the "state's vigorous economic and environmental criteria" prior to being eligible for preferential rates (i.e., levelized rates) under Rule 4.100.¹⁵

The Department opposes Ranger Solar's waiver request, asserting that "approval of the proposed contracts in the manner requested would have the effect of committing preferential long-term, levelized rates (funded by Vermont ratepayers) to [Ranger Solar] at a very early stage of the projects' development."¹⁶

The Department contends that the most efficient path forward is to dismiss the petitions as incomplete. In the alternative, the Department requests a hearing on the petitions.

14. Due to a typographic error in the Board's rule, this provision is incorrectly designated (E) instead of (F).

15. Department motion to dismiss at 3 (citing *Petition of Bio-Energy of Claremont, NH*, Docket No. 5189, Order of 7/29/88 at 15- 17).

16. Department motion to dismiss at 3.

GMP

GMP supports the Department's motion to dismiss and also requests a hearing on the petitions. GMP argues that there is no basis for granting a waiver of Rule 4.104(H). GMP represents that the Board has previously characterized levelized rates as "a loan" from ratepayers to the qualifying facility. As such, GMP contends that it has been the Board's practice to require a demonstration of compliance with the Section 248 criteria prior to approving contracts.

GMP contends that the PPAs do not contain "critical protections for Vermont [electric] customers." Specifically, GMP alleges that the PPAs do not require that the "loan" provided by levelized rates will ever be paid back to ratepayers. According to GMP, the PPAs will handicap Vermont utilities' planning efforts and may cause the utilities to forgo more advantageous opportunities. Finally, GMP asserts that the PPAs are not enforceable and, therefore, conflict with federal regulations.

VEC

VEC argues that Ranger Solar has not demonstrated good cause to grant the requested waiver of Board Rule 4.104(H). VEC disputes Ranger Solar's characterization of its plants as "baseload" because the proposed solar projects "do not produce electricity continuously." VEC alleges that the Projects would not support Vermont's Renewable Energy Standards – in particular, the "Tier II" standard for distributed generation.¹⁷ Also, VEC asserts that the Projects could have the potential to displace generation in VEC's service territory and cause economic harm to VEC's members. Finally, VEC contends that Ranger Solar has not proven that it needs levelized rates to secure financing for the Projects.

V. DISCUSSION

We turn first to the Department's motion to dismiss. Pursuant to Rule 2.208, the Board may reject defective or insufficient filings. A filing is defective or insufficient "if, inter alia, it fails to include all material information required by statute or rule." The Department asserts that

17. Tier II refers to the distributed generation requirements of Vermont's newly-adopted renewable energy standards. See Public Act No. 56, § 3 (2015 Vt. Adj. Sess.)

the petitions are defective because they "provide none of the affirmative testimony and exhibits that would be necessary to evaluate the contracts against the substantive criteria of section 248(b), as required by Rule 4.104(H)."¹⁸

We agree with the Department's analysis. Board Rule 4.104(H) specifically states that "long-term rates and levelized rates shall be available only to qualifying facilities which have been found by the Board, *after* due hearing, to satisfy the substantive criteria of [Section 248]."¹⁹ Accordingly, the Board cannot approve, or otherwise make "available," the long-term, levelized rates contained in the proposed contracts *before* it makes the required Section 248 findings. For this reason, we find that the petitions are substantially insufficient because they do not contain any information that would allow the Board to make the required findings under Board Rule 4.104(H).

We also deny Ranger Solar's request that we waive the requirements of Board Rule 4.104(H). Ranger Solar does not seek an exception to the requirements of Rule 4.104(H) for reasons specific to Ranger Solar or under limited circumstances but instead seeks a broad change in policy from the Board. In particular, Ranger Solar has sought a waiver of Rule 4.104(H) for five projects for the same reasons. Furthermore, Ranger Solar's arguments in support of the requested waiver, such as the need for a signed contract to finance the costs of filing a Section 248 petition or the common use of levelized rates to support renewable energy development, are broadly applicable to an entire class of merchant generators that could seek approval of long-term, levelized rates under Rule 4.100.

In the past, the Board has consistently required the developers of qualifying facilities to make a showing under the Section 248 criteria prior to approving contracts containing long-term, levelized rates under Board Rule 4.100, usually reviewing both the proposed contract and the Section 248 certificate of public good petition in the same proceeding.²⁰ To grant all of the requested waivers would effect a significant change in how the Board applies Rule 4.100,

18. Department motion to dismiss at 3.

19. Rule 4.140(H) (emphasis added).

20. See e.g., *Petition of Winooski One Partnership*, Docket No. 5167, Order of 12/22/88 at 25-26, 56-57; *Petition of Bio-Energy of Claremont, NH*, Docket No. 5189, Order of 7/29/88 at 15- 17.

without notice and in disregard of the procedures contained in the Vermont Administrative Procedures Act.²¹ By law, we are unable to proceed in this fashion.

Even if the Board did have the power to grant all of Ranger Solar's waiver requests, we are not persuaded that the circumstances cited by Ranger Solar constitute good cause to grant the requested waivers. Ranger Solar states that it must have an executed contract prior to access financing to cover project development costs.²² This argument is not persuasive. Furthermore, the Board in the recent past has reviewed the petitions of merchant generation plants whose developers had not yet signed power purchase agreements.²³

In light of our determination that the petitions do not contain sufficient information to be processed, we do not reach the other arguments concerning the merits of the contracts or the rights and obligations arising under PURPA that were raised by the filings in this proceeding.

Pursuant to Board Rule 2.208, the Board will allow a reasonable opportunity to a party to cure any defect or insufficiency, provided that "it will not unreasonably delay any proceeding nor unreasonably adversely affect the rights of any party." In this case, we find that the most efficient process for reviewing the petitions for approval of the PPAs is to do so in conjunction with the proceedings to determine whether to authorize the construction of the Projects under Section 248, consistent with past Board practice.²⁴ Given the time needed to develop a Section 248 petition and the need to provide advance notice of such petitions, it is unclear when these cases will be ready for adjudication.²⁵ Accordingly, these Dockets are hereby stayed until Ranger Solar files complete petitions pursuant to Section 248. At that time, the Board will proceed with its review of the individual Section 248 petitions as well as the requested approval of the respective PPAs.

21. 3 V.S.A. § 836. Briefly stated, the rulemaking process provides the public notice of and a hearing on proposed rule changes, allows for public comment, and allows for review of proposed rules by the Legislature prior to adoption of a final rule that has the force of law. *In re Diel*, 158 Vt. 549, 554, (1992) (holding that substantive change in agency policy or application of rule constituted a "rulemaking"). *See also*, 3 V.S.A. § 845(b)(prohibiting routine waiver of rules without amending rule or providing for waiver procedure).

22. Petition of Ranger Solar, dated September 15, 2015, at 5.

23. *See e.g., Petition of Georgia Mountain Community Wind, LLC*, Order of 6/11/10 at 24.

24. *See e.g., Petition of East Georgia Cogeneration*, Docket No. 5179, Order of 9/12/92.

25. Based upon the filings in these cases, it is the Board's understanding that the 45-day advance notice required by Section 248 has been provided for some, but not all of the Projects.

SO ORDERED.

Dated at Montpelier, Vermont, this 18th day of November, 2015.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/Margaret Cheney</u>)	BOARD
)	
)	OF VERMONT
<u>s/Sarah Hofmann</u>)	

OFFICE OF THE CLERK

FILED: November 18, 2015

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)